UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

# MEMORANDUM

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| **TO:** | Heads and Acting Heads of Departments and Agencies |
| **FROM:** | Charles Ezell, Acting Director, U.S. Office of Personnel Management<br>Andrew Kloster, General Counsel, U.S. Office of Personnel Management |
| **DATE**: | February 4, 2025 |
| **RE**: | Legality of Deferred Resignation Program |

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On Tuesday, January 28, 2025, the U.S. Office of Personnel Management ("OPM") sent an email to federal employes presenting a deferred resignation offer. It allows eligible employees an eight-month transition period—through September 30, 2025—during which they will generally not be expected to work and may look for another job. Eligible employees who accept the deferred resignation offer will also be exempt from any reductions-in-force that are planned for the federal workforce.[1]

In addition, an employee who resigns under this program will retain all pay and benefits regardless of their daily workload and will be exempted from all applicable in-person work requirements until September 30, 2025 (or earlier if the employee chooses to accelerate their resignation for any reason). Employees may also be eligible for early retirement under the Voluntary Early Retirement Authority (VERA). The offer is open between January 28, 2025, and February 6, 2025.

The deferred resignation offer has generated considerable scrutiny and numerous questions from interested employees. The program has also been subject to various legal critiques. This memorandum explains why concerns regarding the program's legality are misplaced and offers clarifying guidance on certain aspects of the plan.

**Is the Offer Legally Binding?** The deferred resignation program offers employees who opt into the program an exemption from any return-to-work requirements and full pay and benefits regardless of workload, with the expectation that most employees will transition their duties and be placed on administrative leave for the bulk of the deferred resignation period. Those assurances

[1] Frequently asked questions about the deferred resignation offer are found here: Frequently Asked Questions.

are binding on the government. Were the government to backtrack on its commitments, an employee would be entitled to request a rescission of his or her resignation.[2]

In addition, to assuage any concerns about enforceability, OPM has circulated a template contract to agencies that can be used to document employee resignations and formalize the government's agreement to abide by the terms of the deferred resignation program. Separation agreements entered into between an agency and its employees are legally binding.[3]

**Is Congressional Approval Required?** Nothing in the deferred resignation program requires congressional approval. The program offers employees an exemption from return-to-work requirements and, in most cases, a significantly reduced workload during the deferred resignation period. Under the program, employees remain in duty status entitled to their regular pay and benefits. The program does not promise employees additional compensation that might require special congressional appropriations.

An employee who has chosen to participate in the deferred resignation program will not be placed at a disadvantage compared to other employees if congressional appropriations lapse. In the event of a partial or complete government shutdown, payments to *all* affected employees (regardless of whether they accepted the deferred resignation offer) would be temporarily paused. Upon passage of another appropriations bill, however, affected employees would be eligible for retroactive pay "at the earliest date possible" under the Government Employee Fair Treatment Act of 2019.[4]

Nor would a shutdown impact the non-pay aspects of the deferred resignation program. Even if an employee's job duties would generally require him or her to work during a shutdown, an "agency may allow an excepted employee to be off duty during periods when the employee was previously scheduled to be on paid leave," including administrative leave.[5]

**May an Employee Be Placed on Administrative Leave During the Deferred Resignation Period?** Yes. The decision to grant administrative leave, and for how long, lies largely within the agency's discretion.[6] A statute governing administrative leave states that, "[d]uring any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days."[7] But binding regulations promulgated by OPM have

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[2] *See Terban v. Dep't of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000) (holding that resignations are deemed involuntary if they are "the product of misinformation or deception by the agency").

[3] *See Green v. GSA*, 220 F.3d 1313, 1317 (Fed. Cir. 2000) (enforcing "a term of the separation agreements" between an employee and his employing agency).

[4] 31 U.S.C. § 1341(c)(2).

[5] OPM, *Guidance for Shutdown Furloughs*, at 10 (Dec. 2021).

[6] *See* 89 Fed. Reg. 102256, 102257 (Dec. 17, 2024) ("Federal agencies have the discretion to grant paid administrative leave to employees to help manage their workforces when it is in their best interest to do so.") (citation omitted).

[7] 5 U.S.C. § 6329a.

interpreted that limitation to apply only to a "management-initiated action to put an employee in administrative leave status, with or without the employee's consent, for the purpose of conducting an investigation."[8] The ten-day rule therefore poses no bar to the extended administrative leave contemplated by the deferred resignation program. And the regulations authorize administrative leave when, as here, the "absence is officially sponsored or sanctioned by the agency."[9]

**May an Employee Get a Second Job During the Deferred Resignation Period?** Extended administrative leave frees an employee to obtain a second job. In doing so, employees must comply with the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635 and other applicable federal laws, as well as any agency-specific regulations. The ethical standards, among other things, provide that "[e]mployees shall not engage in outside employment or activities . . . that conflict with official Government duties and responsibilities."[10] By minimizing an employee's job duties and limiting the number of matters in which he or she is involved, administrative leave reduces the potential for conflicts with any outside employment.

**Does the Deferred Resignation Email Comply with Privacy Rules?** Yes. OPM was authorized to send the email announcing the deferred resignation program by its broad authority to oversee the federal workforce.[11] OPM is authorized to store employee responses under existing systems of records, including systems encompassing personnel records and correspondence to and from the agency.[12] And the deferred resignation offer explicitly provides that, by responding to the email, employees consent to their resignations being shared with their employing agencies. The Privacy Act of 1974 authorizes disclosure of personally identifiable information "with the prior written consent of [ ] the individual to whom the record pertains."[13]

Employees' resignations are stored on secure government systems at OPM. Although the E-Government Act of 2002 requires agencies to conduct a Privacy Impact Assessment when developing certain information technology systems, no such assessment was required here. Longstanding OMB and OPM guidance expressly provide that Privacy Impact Assessments are unnecessary when a system collects information exclusively from government employees, not from the public.[14]

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[8] 5 C.F.R. § 630.1404(a).

[9] 5 C.F.R. § 630.1403(a)(1)(iv).

[10] 5 C.F.R. 2635.101(b)(10); *see* 5 C.F.R. 2635.606(a) (providing that an "employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person by whom the employee is employed").

[11] *See, e.g.*, Executive Order 9830 and 5 U.S.C. 1103, 1104, 2951.

[12] *See* 88 Fed. Reg. 56058 (Aug. 17, 2023); 80 Fed. Reg. 72455 (Nov. 19, 2015).

[13] 5 U.S.C. § 552a(b).

[14] *See* OMB, *Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002*, M-03-22, at 5 & n.6 (Sept. 2003); OPM, *Privacy Impact Assessment Guide*, at 2 (Apr. 2010).

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, Human Resources Directors, and Chiefs of Staff.

Attachment 1- Template Deferred Resignation Agreement

## Appendix 1- Template Deferred Resignation Agreement

Deferred Resignation Agreement

This agreement is between [AGENCY] and the Employee identified below.

WHEREAS, on or about January 28, 2025, OPM circulated a memorandum to all [AGENCY] employees (Fork in the Road Memo) offering them a voluntary deferred resignation option. The offer allows those employees who accept the offer by February 6, 2025 to retain all pay and benefits and exempts them from all applicable in-person work requirements until September 30, 2025, or earlier if they choose to accelerate the resignation date for any reason (Deferred Resignation Program); and

WHEREAS, [AGENCY] has received Employee's voluntary request to be included in the Deferred Resignation Program; and

WHEREAS, [AGENCY] accepts Employee's request to be included in the Deferred Resignation Program; and

WHEREAS, the parties wish to express the terms and conditions of the agreement between the parties concerning Employee's participation in the Deferred Resignation Program.

WHEREFORE, the parties hereto agree as follows:

1. Employee is accepted into the Deferred Resignation Program.

2. Employee agrees to continue working through [February 28, 2025], in an effort to ensure a smooth transition of Employee's duties, responsibilities and work assignments to other staff. Employee is exempt from all in-person work requirements. Employee agrees to turn in all [AGENCY] equipment and property on or before [February 28, 2025], as directed by Employee's supervisor.

3. Employee shall be placed on paid administrative leave no later than [March 1, 2025]. Employee shall remain on paid administrative leave up through and including September 30, 2025, or such earlier date on which Employee may choose to resign or otherwise separate from federal service (deferred resignation period). During the deferred resignation period, [AGENCY] shall continue to pay Employee's current salary and Employee shall continue to retain and receive all benefits of Employee's federal employment, including but not limited to TSP contributions, health, dental, vision and/or any other similar benefits, with [AGENCY] making the government's contribution. Employee will continue to accrue annual and sick leave during the deferred resignation period. Employee will receive retirement service credit during the deferred resignation period. If Employee becomes eligible for a within-grade increase during the deferred resignation period, [AGENCY] shall process the within-grade increase and Employee shall receive the associated salary increase.

4. Employee shall not be expected to work during the deferred resignation period except in rare circumstances as determined by [AGENCY].

5. Employee agrees that Employee's effective resignation date from [AGENCY], and separation from federal service, shall be September 30, 2025. Employee, however, may resign from the federal service on any date prior to September 30, 2025. [AGENCY] shall not take steps to terminate Employee's employment with the federal service prior to September 30, 2025, except where Employee is convicted of a felony crime that would render Employee ineligible for Federal employment.

6. Employee will receive a lump sum payment of accrued annual leave in accordance with 5 CFR part 550 upon separation from service.

7. Nothing in this agreement prevents Employee from retiring from federal service at any time if Employee is eligible to do so under the applicable provisions of CSRS or FERS. If Employee is eligible and elects to retire before September 30, 2025, Employee's retirement election shall override any benefits that would be available to Employee under this agreement after the effective date of Employee's retirement. Employee understands that Employee is responsible for submitting a CSRS or FERS application.

8. Nothing in this agreement prevents Employee from retiring from federal service on or before [INSERT VERA END DATE] if Employee is eligible to do so under the Voluntary Early Retirement Authority (VERA). If Employee is eligible and elects to retire under VERA, Employee's retirement election shall override any benefits that would be available to Employee under this agreement after the effective date of Employee's retirement. Employee understands that Employee is responsible for submitting a VERA application.

9. Employee may accept non-federal employment during the deferred resignation period provided it does not violate the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635 or other applicable federal laws, or any supplemental Standards of Ethical Conduct for Employees or regulations of [AGENCY].

10. By signing this agreement, the parties acknowledge that they have entered the agreement knowingly, voluntarily, and free from improper influence, coercion, or duress. Employee understands that, except as provided in paragraph 14 applicable to Employees 40 years of age or older, this agreement cannot be rescinded, except in the sole discretion of the [AGENCY HEAD], which shall not be subject to review at the Merit Systems Protection Board (MSPB) or any other forum, and waives all rights to challenge the resignation before the MSPB or any other forum.

11. Employee acknowledges that [AGENCY], in conjunction with other federal departments, agencies and units, will immediately rely on the terms of this agreement in consolidating and reassigning roles and otherwise taking steps to reform the agency workforce. Consequently, Employee understands that this agreement is final and Employee's decision to resign effective September 30, 2025, unless Employee resigns or retires earlier as set forth above, is final. [AGENCY] shall comply with all terms of this agreement even if Employee's position is

eliminated or reassigned prior to September 30, 2025. Employee shall not be subject to furlough, termination, reduction in force or layoff as a result of an OPM or federal government reorganization or reduction in force. Employee agrees to cooperate with steps taken by [AGENCY] (such as reassignment to a different component) to exempt Employee from any reduction in force.

12. If there is a lapse in appropriations during the term of this agreement that requires Employee to be placed on furlough status, Employee shall be placed on furlough status during the lapse. Once the lapse is over, Employee shall be taken off furlough and shall receive back pay consistent with the Government Employee Fair Treatment Act of 2019.

13. Employee forever waives, and will not pursue through any judicial, administrative, or other process, any action against [AGENCY] that is based on, arising from, or related to Employee's employment at [AGENCY] or the deferred resignation offer, including any and all claims that were or could have been brought concerning said matters. This waiver includes all claims Employee may have under the Age Discrimination in Employment Act. Employee unconditionally releases [AGENCY] and its present and former employees, officers, agents, representatives, and all persons acting by, through, or in concert with any of those individuals, either in their official or individual capacities, from any and all liability based on, arising from, or relating to the matters that Employee may have against them, including any and all claims that were or could have been brought. Consistent with applicable law, Employee similarly waives any claim that could be brought on Employee's behalf by another entity, including Employee's labor union.

14. If 40 years of age or older, Employee understands that they are entitled to rights and benefits under the Age Discrimination in Employment Act and Older Workers Benefit Protection Act (OWBPA). The parties acknowledge that the Employee has preserved and/or executed the following rights and responsibilities:

    a. The Employee has reviewed the entire agreement and understands its provisions;
    b. The Employee has not waived any ADEA or OWBPA rights or claims that may arise after the date this agreement is signed;
    c. The Employee has the right to consult with an attorney prior to signing this Agreement;
    d. Federal law provides that the Employee may have 45 days from receipt of this Agreement to review and consider this Agreement before signing it;
    e. Federal law further provides that the Employee may revoke this Agreement within seven days after signing and delivering the Agreement to the Agency; the Agreement is not effective and enforceable until this seven-day revocation period has passed; and
    f. Having been informed of these rights and after an opportunity to consult with an attorney, the Employee hereby waives these rights.

15. [AGENCY] agrees to waive any debt owed by Employee to [AGENCY] pursuant to a recruitment incentive, student loan repayment, or other service agreement. [AGENCY] also agrees to waive any remaining service requirements from taking paid parental leave.

16. Should Employee become subject to military orders during the deferred resignation period, then any laws, rules, or other guidance applicable to the Employee as a servicemember that are inconsistent with provisions of this agreement shall supersede the inconsistent terms of this agreement.

17. In case any provision of this shall agreement be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

ON BEHALF OF [AGENCY]:

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[NAME, TITLE]

EMPLOYEE

_____

[NAME, TITLE]